

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESMOND KINDLE,

Defendant-Appellant.

UNPUBLISHED

November 14, 1997

No. 192680

Recorder's Court

LC No. 95-004187

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

Defendant appeals by right his convictions by jury of assault with intent to commit great bodily harm less than murder, MCL 7508f; MSA 28.279, and possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the prosecutor violated his Fifth Amendment right by cross-examining him concerning his post-arrest, post-*Miranda* silence, an asserted violation of *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). The transcript reveals, however, that the prosecutor actually examined defendant concerning defendant's failure to report to police, consistent with his version of the incident, prior to arrest, that the ostensible victim had actually tried to murder defendant and that defendant was the victim, not the perpetrator, and to inquire whether defendant's post-arrest statement to police was different in any significant way from his trial testimony. Neither questions concerning defendant's failure to report a crime against his person, *People v Cetlinski (After Remand)*, 435 Mich 742; 460 NW2d 534 (1990), nor questions concerning variances between defendant's trial testimony and his post-arrest statement to police, *People v Sutton (After Remand)*, 436 Mich 575; 464 NW2d 276 (1990); *People v Collier*, 426 Mich 23; 393 NW2d 346 (1986); *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996), violated defendant's Fifth Amendment rights, and therefore defendant's motion for mistrial was properly denied. That defendant may not have actually made a post-arrest statement is irrelevant, the jury was left with the impression that he had.

* Circuit judge, sitting on the Court of Appeals by assignment.

Prior to trial, the prosecutor agreed to instruct the complainant not to mention the fact that defendant had been released from jail immediately before this incident. The prosecutor neglected to give the complainant the agreed-upon instruction. During direct examination of the victim, the victim mentioned that, a year before this incident, defendant had just gotten out of jail. This unresponsive, volunteered answer to an otherwise proper question does not evidence a wilful violation by the prosecutor of the court's ruling and defendant's motion for mistrial on this basis was properly denied. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In a Standard 11 brief, Administrative Order 1981-7, Standard 11, defendant contends that he was deprived of the effective assistance of counsel at trial. Defendant has failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness as required of minimally competent criminal defense practitioners, or that any such dereliction prejudiced defendant's right to a fair trial. Accordingly, appellate relief on this issue is unwarranted. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood